Heng Ah Yai v Public Prosecutor

HIGH COURT (KUCHING) — NO 42–21 OF 2007-III
DAVID WONG J
30 JULY 2008

Criminal Law — Anti-Corruption Act 1997 — s 10(a)(aa) — Illegal gratification — Meaning of 'actual or proposed or likely to take place'

Evidence — Circumstantial evidence — Drawing adverse inference — Accused chose to remain silent — Presumption — Anti-Corruption Act 1997 s 42

Evidence — Circumstantial evidence — Inferences from facts — Whether pointed to irresistible conclusion that appellant and deceased engaged in criminal conspiracy to receive gratification

The learned sessions court judge convicted the appellant of three offences under s 10(a)(aa) of the Anti Corruption Act 1997 ('the Act') and sentenced and fined him. The appellant was originally charged with one Shaharuddin bin Ainie ('the deceased') in a criminal conspiracy, corruptly received for himself gratification, to wit, cash money of RM30,000, RM50,000 and RM30,000 respectively from PW1 vide the account of one Mohd Kamal bin Md Yusoff. The appeal could be dealt with by deliberating on two issues: (i) Whether the charges of corruption under the Anti-Corruption Act 1967 was valid in that the evidence points more to a cheating case than a corruption case? (ii) Whether the learned sessions court judge was correct in her conclusion that the circumstantial evidence adduced in court pointed irresistibly to the conclusion that the appellant and the deceased were engaged in a criminal conspiracy to receive gratification from the complainant, PW1?

Held, dismissing the appeal:

(1) The 'act' induced could be a 'proposed' act. In this case the proposed 'act' which was to take place was the closing of the investigation against PW1 by ACA. Soliciting and receiving gratification as an inducement for that proposed act came under s 10(a)(aa) of the Act irrespective of whether or not there was in fact an investigation on PW1 by the ACA (see para 13).

(2) The learned sessions court judge from the outset was fully aware of the fact that the prosecution case was one of circumstantial evidence. The learned sessions court judge started off by examining the relationship of the appellant and the deceased and came to the conclusion that their relationship was a close one. Having analysed the evidence from the notes of evidence, the court was of the view that the conclusion arrived at by the learned sessions court judge was one which a reasonable tribunal would have come to (see para 20).

(3) The learned sessions court judge was correct to raise the presumption of s 42 of the Act. Since the appellant chose to remain silent when she called for his defence she had no option but to conclude that the prosecution had proven its case beyond reasonable doubt and convicted the appellant as charged (see para 20).

[Bahasa Malaysia summary

Hakim mahkamah sesyen yang bijaksana mensabitkan perayu dengan tiga kesalahan di bawah s 10(a)(aa) Akta Pencegahan Rasuah 1997 ('Akta tersebut') and menghukum serta mendenda beliau. Perayu pada asalnya telah dituduh bersama seorang bernama Shaharuddin bin Ainie ('si mati') dengan konspirasi jenayah, secara korup menerima untuk dirinya suapan, di antaranya wang tunai berjumlah RM30,000, RM50,000 dan RM30,000 masing-masing dari PW1 melalui akaun seorang bernama Mohd Kamal bin Md Yusoff. Rayuan ini boleh ditangani dengan menimbangkan dua isu: (i) Sama ada pertuduhan-pertuduhan korupsi di bawah Akta Pencegahan Rasuah 1967 adalah sah yang mana bukti lebih menunjukkan kepada kes penipuan daripada kes korupsi? (ii) Sama ada hakim mahkamah sesyen yang bijaksana adalah betul dalam kesimpulan beliau bahawa keterangan ikut keadaan yang dikemukakan di mahkamah menunjukkan tanpa paksaan kepada kesimpulan bahawa perayu dan si mati telah terlibat dalam konspirasi jenayah untuk menerima suapan dari pengadu, PW1?

Diputuskan, menolak rayuan:

(1) 'Tindakan' yang didorong boleh jadi tindakan yang 'dicadangkan'. Dalam kes ini 'tindakan' yang dicadangkan untuk berlaku adalah penutupan penyiasatan terhadap PW1 oleh Badan Pencegah Rasuhah (BPR). Mencari dan menerima suapan sebagai pendorong untuk tindakan yang dicadangkan termasuk di bawah s 10(a)(aa) Akta tersebut tanpa mengira sama ada terdapat penyiasatan ke atas PW1 oleh BPR (lihat perenggan 13).

(2) Hakim mahkamah sesyen yang bijaksana dari awal menyedari bahawa kes pendakwaan melibatkan keterangan ikut keadaan. Hakim

mahkamah sesyen yang bijaksana memulakan dengan mengkaji hubungan di antara perayu dan si mati dan mencapai keputusan bahawa hubungan mereka adalah rapat. Setelah menganalisa keterangan dari nota-nota keterangan, mahkamah berpendapat bahawa kesimpulan yang dicapai oleh hakim mahkamah sesyen yang bijaksana adalah sesuatu yang tribunal yang munasabah akan turut memutuskan (lihat perenggan 20).

(3) Hakim mahkamah sesyen yang bijaksana adalah betul untuk membangkitkan anggapan s 42 Akta tersebut. Memandangkan perayu memilih untuk berdiam apabila hakim memanggil perayu untuk membuat pembelaan, beliau (hakim) tidak mempunyai pilihan tetapi untuk memutuskan bahawa pendakwaan telah membuktikan kes melampaui keraguan yang munasabah dan mensabitkan perayu seperti dituduh (lihat perenggan 20)]

Notes

For a case on drawing adverse inference, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 627.

For a case on s 10(a)(aa) of Anti-Corruption Act 1997 generally, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 18.

For cases on inferences from facts, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 629–631.

Cases referred to

Tan Thong Jin v PP [2002] 3 MLJ 695 (refd)

Yan Wing Lee v PP [1993]MLJU 99; [1994] 2 CLJ 453 (refd)

Legislation referred to

Anti-Corruption Act 1997 s 10(a)(aa)

Anthony Tai (Detta Samen with him) (Anthony Tai & Co) for the appellant.

Mohamad Jazamuddin bin Ahmad Nawawi (Legal and Prosecution Section Anti Corruption Agency) for the respondent.

David Wong J:

APPEAL

[1] This is the hearing of an appeal against the decision of the learned sessions court judge who convicted the appellant of three offences under s 10(a)(aa) of the Anti-Corruption Act 1997 ('the Act') and sentenced him to two years imprisonment for each charge, the sentence to run concurrently and with a fine of RM150,000 and in default of payment thereof to six months' imprisonment for the first charge; RM250,000 and in default of

payment thereof to six months' imprisonment for the second charge; and RM250,000 and in default of payment thereof to six months' imprisonment for the third charge.

[2] The charges preferred against the appellants read as follows:

First Re-re amended charge (in respect of Case No SC-62-445-03-1)

That you, on 28 January 2002 at about 11.35am at Arab Malaysian Finance Berhad, Jalan Abell, Kuching, Sarawak, together with Shaharuddin bin Ainie (the deceased) (I/C No 660917-13-5139) engaged in a criminal conspiracy, corruptly received for yourself gratification, to wit, cash money of RM30,000 from Puasa bin Pandin vide the account of Mohd Kamal bin Md Yusoff ie Account No 099-002-00455-4 with Arab Malaysian Finance Bhd, as an inducement to settle the case against Puasa bin Pandin who was allegedly investigated by the Anti-Corruption Agency and that you have thereby committed an offence under section 10(a)(aa) of the Anti-Corruption Act 1997, read together with s 20(1)(v) of the same Act and punishable under section 16 of the same Act.

Second Re-re amended charge (in respect of Case No SC-62-446-03-I) I

That you, on 31 January 2002 at about 10.00am. at Arab Malaysian Finance Bhd, Jalan Abell, Kuching, Sarawak, together with Shaharuddin bin Ainie (the deceased) (I/C No 660917-13-5139) engaged in a criminal conspiracy, corruptly received for yourself gratification, to wit, cash money of RM50,000.00 from Puasa bin Pandin vide the account of Mohd Kamal bin Md Yusoff ie Account No 099-002-00455-4 with Arab Malaysian Finance Bhd, as an inducement to settle the case against Puasa bin Pandin who was allegedly investigated by the Anti-Corruption Agency and that you have thereby committed an offence under section 10(a)(aa) of the Anti-Corruption Act 1997, read together with section 20(1)(v) of the same Act and punishable under section 16 of the same Act.

Third Re-re amended charge (in respect of Case No SC-62-447-03-III)

That you, on 1 February, 2002 at about 11.35am at Arab Malaysian Finance Bhd, Jalan Abell, Kuching, Sarawak, together with Shaharuddin bin Ainie (the deceased) (I/C No 660917-13-5139) engaged in a criminal conspiracy, corruptly received for yourself gratification, to wit, cash money of RM30,000.00 from Puasa bin Pandin vide the account of Mohd Kamal bin Md Yusoff ie Account No 099-002-00455-4 with Arab Malaysian Finance Bhd, as an inducement to settle the case against Puasa bin Pandin who was allegedly investigated by the Anti-Corruption Agency and that you have thereby committed an offence under section 10(a)(aa) of the Anti-Corruption Act 1997, read together with section 20(1)(v) of the same Act and punishable under section 16 of the same Act.

ISSUES

[3] Having read the appellant's petition of appeal and counsel's submissions this appeal, in my view, can be dealt with by deliberating on two issues:

(1) Whether the charges of corruption under the Anti-Corruption Act 1967 is valid in that the evidence points more to a cheating case than a corruption case?

(2) Whether the learned sessions court judge was correct in her conclusion that the circumstantial evidence adduced in court point irresistibly to the conclusion that the appellant and the deceased were engaged in a criminal conspiracy to receive gratification from the complainant, one Puasa bin Pandi (PW1)?

BACKGROUND FACTS

[4] The appellant was initially charged together with one Shaharuddin bin Ainie (deceased) with three charges under s 10(a)(aa) of the Act. However on 16 October 2006, the prosecution withdrew the three charges against the deceased for obvious reason. The appellant however was charged with three re-re-amended charges as set out above.

[5] On 25 January 2002, PW1 received a phone call from a person by the name of Mohamad Kamal who had held himself as an officer from the anti corruption office (ACA) informing him that he was under investigation for making corrupt payment to one 'Dato' and several persons in Kuala Lumpur. Mohamad Kamal also informed PW1 that he can help to close the ACA investigation if PW1 make payment of RM30,000 to him and the director of ACA. Despite denial of the corrupt payment, PW1 acceded to the request of the payment of RM30,000 as he genuinely thought he was under investigation because he had, prior to Mohamad Kamal's phone call, received a call from an ACA officer (PW6) who wanted to record a statement from him in respect of a former staff. PW6 in his testimony did confirm that he called PW1 but there was no investigation being conducted against him. Further PW1 had been repeatedly threatened with arrest by Mohamad Kamal. On 27 January 2002, Mohamad Kamal rang PW1 and instructed him to deposit the sum of RM30,000 into an account at Arab Malaysian Finance Bhd (AMFB). That amount was deposited by PW1.

[6] On 30 January 2002 PW1 received another call from Mohamad Kamal who demanded for another RM50,000 giving the excuse that the director of ACA had wanted more. PW1 again acceded to the demand and on 31 January 2002 made arrangement to deposit the sum of RM50,000 into the AMFB account. On the afternoon of 31 January 2002, PW1 returned a missed call from Mohamad Kamal who informed him that the director was still not satisfied and wanted another RM50,000. This was confirmed by someone acting as the ACA director by telling PW1 over the phone that he had originally wanted RM100,000 and not RM50,000. Again PW1 deposited another RM50,000 into the AMFB account.

[7] The AMFB account in fact belonged to one Mohamad Kamal bin Md Yusoff (PW3) who however denied that he had ever rung PW1 to request for

any money. He testified that he was a close friend of the deceased whom he called 'Shah' and had requested financial help from the deceased sometime in December 2001. The deceased then told him that he could not help him but however requested for PW3's bank account number so that he can bank in money when circumstances allowed him to do so. On 28 January 2002 PW3 received a call from the deceased informing him that a sum of RM30,000 would be deposited into his account. The next day, PW3 checked his account and found that the sum had been deposited. He then called the deceased who instructed him that he can take RM5,000 to settle his financial woes, deposit a sum of RM22,500 into the account of Sharifah Rajuna bt Wah Hamid (PW5) and to deposit the balance of RM2,500 into the account of the deceased's wife. PW5 in her testimony said the appellant is also known as Frankie and identified him in court as the accused. She had been living with the appellant for three years since 1999 and has a child from this union. On 28 January, 2002 the deceased went to PW5's house and requested the use of her bank account at Maybank in Kuala Lumpur. The appellant was present and he asked PW5 to allow the deceased to use her bank account. On that same day PW5 went to the bank with the deceased and the appellant and withdrew RM22,500 and gave it to the deceased. She was given RM200 as appreciation for the use of her bank account.

[8] On 30 January 2002 PW3 was requested by the deceased to and did fetch him at the Subang Airport. They then went to meet one Frankie at Yow Chuan Plaza. This Frankie was introduced to PW3 as a friend of the deceased and was told that he and the deceased were on a 'business transaction'. Frankie was identified by PW3 in court as the appellant.

[9] On 31 January, 2002, the deceased requested PW3 to take him and the appellant to PW3's bank to withdraw RM50,000, which PW3 did and handed the same to the deceased in an envelope. This amount is the second amount deposited by PW1 into the AMFB account. After that PW3 took both of them to Malayan Bank where the appellant and deceased went into the bank. Again on 1 February 2002, PW3 was requested by the deceased to take him to a bank to withdraw the third deposited amount of RM50,000. On this occasion only PW3 and the deceased went to the Arab Malaysian Finance Branch in Petaling Jaya. However PW3 was only able to withdraw RM20,000 in view of the bank's limit on cash withdrawal. That amount was handed over to the deceased. On 4 February 2002, PW3 at the request of the deceased went to the bank to withdraw the balance of RM30,000. On this occasion the appellant and the deceased was with PW3. After the withdrawal of the RM30,000 PW3 handed it over to the deceased who in turn gave it to the appellant. After that PW3 was asked by the deceased to take them to Malayan Bank so that the appellant can pay his car loan. Upon arrival at the bank the appellant went into the bank alone.

[10] At the end of the prosecution case, the learned sessions court judge found that there was a prima facie case and called upon the appellant to enter his defence. The appellant chose to remain silent. The learned sessions court judge then found that based on the totality of evidence adduced the prosecution has proven its case beyond reasonable doubt and convicted the appellant on the three charges.

Issue 1: Whether the charges of corruption under the Anti-Corruption Act 1967 is valid in that the evidence points more to a cheating case than a corruption case?

[11] On this aspect Mr Anthony Tai (Mr Tai), counsel for the appellant, contended that since there was no investigation by the ACA against PW1 and also the fact that neither the deceased nor the appellant were ACA officers, there could not be any offence under the Act and if there is any offence it would be more of a cheating case than a corruption case.

[12] This issue was not raised in the court below and the petition of appeal. It is trite law that when an issue is not raised in the petition of appeal, the appellate court is not under any obligation to do so (see *Yan Wing Lee v Public Prosecutor* [1993] MLJU 99; [1994] CLJ 453). Be that as it may, I shall deal with it by first looking at s 10(a)(aa) of the Act which reads as follows:

> Offence of accepting gratification.
>
> 10. Any person who by himself, or by or in conjunction with any other person —
>
> (a) corruptly solicits or receives or agrees to receive for himself or for any other person; or
>
> (b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,
>
> any gratification as an inducement to or a reward for, or otherwise on account of —
>
> (aa) any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or
>
> (bb) any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned,
>
> shall be guilty of an offence.

[13] Having read the section, I agree with the learned DPP that the 'act' induced can be a 'proposed' act. In this case the proposed 'act' which was to

take place was the closing of the investigation against PW1 by ACA. Soliciting and receiving gratification as an inducement for that proposed act, in my view, comes under s 10(a)(aa) of the Act irrespective of whether or not there was in fact an investigation on PW1 by the ACA.

Issue 2: Whether the learned sessions court judge was correct in her conclusion that the circumstantial evidence adduced in Court point irresistibly to the conclusion that the appellant and the deceased were engaged in a criminal conspiracy to receive gratification from the complainant, one Puasa bin Pandi (PW1)?

[14] In an appeal on a finding of facts, the approach of an appellate court is as stated in *Tan Thong Jin v Public Prosecutor* [2002] 3 MLJ 695, where the Court of Appeal said at p 558 as follows:

> It is trite law that an appellate court will not readily interfere with the findings of fact arrived by the trial court to which the law entrusts the primary task of evaluation of evidence. But it is the duty of the appellate court to intervene in a case where the trial court had fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. (See *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395).

[15] The question which I need to ask myself is whether the decision of the learned sessions court judge is one which no reasonable tribunal would arrive at.

[16] Mr Tai's submission can be summarised as follows:

(1) Not only was there was no direct evidence that the appellant had received the respective sums of RM30,000, RM50,000, RM30,000 as per the respective charges, the circumstantial evidence adduced did not irresistibly point to a conclusion that the appellant had received the various sums as in the charges.

(2) Not only was there no evidence of any criminal conspiracy, the circumstantial evidence adduced did not irresistibly point to a conclusion that the appellant and the deceased were involved in a conspiracy to receive money from PW1.

[17] As regards Mr Tai's first contention: There are circumstantial evidence to show that the appellant had received the sum of RM30,000, as in the first re-re amended charge. PW3 was instructed by the deceased to deposit a sum of RM22,500 into PW5's account (PW5 is the civil law wife of the appellant). This deposit of RM22,500 into PW5's account points irresistibly to the conclusion that the money was meant for the appellant as deceased did

not owe PW5 any money. If that money was meant solely for the deceased, the deceased would have asked PW3 to transmit the full amount of RM25,000 to his wife's account and not just RM2,500.

[18] In respect of the sum of RM50,000 in the second re-re amended charge, there is undisputed evidence from PW3 that the sum of RM50,000 was handed over to the deceased who, together with the appellant, later went into the premises of Malayan Bank. Further there is undisputed evidence that the deceased had told PW3 that the money was from the business of the appellant.

[19] In respect of the sum of RM30,000 in the third re-re amended charge, there is direct and undisputed evidence by PW3 that the appellant was given the money by the deceased after he had received it from PW3.

[20] As for Mr Tai's second contention, it cannot be sustained for the following reasons:

(1) The learned sessions court judge from the outset was fully aware of the fact that the prosecution case was one of circumstantial evidence and this is evident from her judgment where she said:

> Likewise, there is no witness in this case who can say that in his presence the accused and Shaharuddin bin Ainie agreed to carry out an unlawful act. The prosecution relies solely on the inferences of facts to be drawn from the circumstantial evidence to show that the accused and Shaharuddin bin Ainie were engaged in criminal conspiracy.

So one can say that she had taken the right approach in evaluating the evidence before her.

(2) The learned sessions court judge started off by examining the relationship of the appellant and the deceased and came to the conclusion that their relationship was a close one. The evidence which she relied on were these:

(a) The use of PW5's bank account. This is what she said:

> Bank account by its personal nature is not something one readily allows other people to have access to and when one does allow it, it can be reasonably inferred that there must exist some very close and special relation between the account holder and the 'user'.

(b) The deposit of RM22,500 into the account of PW5. This is what she said:

> In my view, if Shaharuddin bin Ainie alone had hatched the scheme of inducing PW1 to pay the gratification as inducement to close the ACA investigation on him, it makes no sense why he would instruct PW3 to remit RM22,500 into the account of PW5 and only RM2,500 into his own wife's account. Given that his wife had an account, the logical and reasonable thing would be for Shaharuddin bin Ainie to remit all the balance after deducting RM5,000 (given to PW3) into his wife's account. Why then would Shaharuddin bin Ainie instruct PW3 to deposit RM22,500 into PW5's account? There was no evidence or suggestion that Shaharuddin bin Ainie owed PW5 money …

(c) The fact that the deceased instructed PW3 to deposit RM22,500 into PW5's account prior to seeking her consent was significant. This is what she said:

> I had earlier on given my reasons why I do not think the date on which Shaharuddin bin Ainie informed PW3 that a sum of RM30,000 might be deposited into his account could not be on 28 January 2002 as testified by PW3, and the date should be 27 January 2002. Given that Shaharuddin bin Ainie had already instructed PW3 to bank RM22,500 into PW5's account even before he had spoken to her, and the confidence of Shaharuddin bin Ainie of being certain that PW5 would agree to 'lend' her account to receive the said money, coupled with the accused telling PW5 to 'lend' her account to Shaharuddin bin Ainie leads irresistibly to the conclusion that the accused had knowledge of how the sum of RM22,500 was received because he and Shaharuddin bin Ainie were engaged in a conspiracy to induce PW1 to pay the said gratification.

(d) The fact that on 4 February 2002, the appellant went with the deceased and PW3 to withdraw the remaining balance of RM30,000, took it and went into the Malayan Bank alone to pay his car loan.

(3) The learned sessions court judge did what was required of her, that is to look at the totality of the evidence and determine what that entailed. This was what she said:

> In my judgment when all the above evidence are considered in totality, I consider the accused's presence with Shaharuddin bin Ainie on 28 January 2001 when PW5 withdrew RM22,500, on 31 January 2002 when PW3 withdrew RM50,000 and on 4 February 2002 when PW3 withdrew the balance of RM30,000, was far from being coincidental. On the contrary, it leads to an irresistible and logical inference that the accused knew that Shaharuddin bin Ainie had been calling PW1 by impersonating as 'Mohamad Kamal' and that they had conspired together to induce PW1 paying them gratification to close the ACA investigation on him.

A After PW1 had shown to be an 'easy meat' by agreeing to pay RM30,000 on 28 January 2001 and RM50,000 on 30 January 2002, the accused and Shaharuddin bin Ainie came to KL together on 31 January 2002 to make their 'collections', as Shaharuddin bin Ainie told PW3. Although there was no evidence that the accused received
B RM22,500 and RM50,000 and RM20,000 (part of the second RM50,000), the subsequent presence of the accused on 4 February 2002 when Shaharuddin bin Ainie and PW3 went to withdraw the balance of RM30,000 coupled with the unchallenged evidence that Shaharuddin bin Ainie handed RM30,000 that PW3 had withdrawn to the accused, who then went to Maybank with the money leads to the
C irresistible inference that the accused was the one who received the money, while Shaharuddin bin Ainie was an 'errand boy' (as the learned deputy put it) whose task was to call PW1 and looked for an account into which the 'collections' could be paid, preferably someone's account to avoid implication, to give instruction to PW3 on the withdrawals
D and then hand over the 'collections' to the accused.

Having analysed the evidence from the notes of evidence, I am of the view that the conclusion arrived at by the learned sessions court judge was one which a reasonable tribunal would have come to.

E (4) The learned sessions court judge was correct to raise the presumption of s 42 of the Act. Since the appellant chose to remain silent when she called for his defence she had no option but to conclude that the prosecution had proven its case beyond reasonable doubt and convicted the appellant as charged.

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[21] Accordingly I dismiss this appeal.

Appeal dismissed.

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Reported by Sally Kee

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